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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1164

ALFRED A. KNOPF, INC., VICTOR L. MARCHETTI, JOHN D. MARKS,
Petitioners,

—v.—

WILLIAM COLBY, as Director of Central Intelligence of the United States, and HENRY KISSINGER, as Secretary of State of the United States,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Three years ago, when the original Marchetti case was before this Court, the brief in opposition submitted on behalf of the United States urged that it was "premature" for the Court to hear the case because Marchetti "has not submitted any material for approval [by the Agency], and the Agency has not declined to approve any

material for publication." (p.12). This Court then denied certiorari, three Justices dissenting. Marchetti v. United States, 409 U.S. 1063 (1972). In the interim, Marchetti and his co-author, Marks, wrote "The CIA and the Cult of Intelligence"; the book was submitted to the Agency; the Agency did decline to "approve" significant portions of it; judicial review followed in the District Court and the Court of Appeals; and the position of the respondents -- once again -- is that "there is no occasion for this Court to review this case in its present posture." (p. 8).

The "present posture" of the case may be simply stated. A prior restraint has been in effect against Marchetti since April 18, 1972 and against publication of the entirety of "The CIA and the Cult of Intelligence" since its completion and submission to the Agency in August, 1973. For this Court to decline to hear the case pending still further hearings at the District Court level and still further appeals to the Court of Appeals would eviscerate First Amendment rights already gravely harmed by the very processes of litigation this case has engendered. As this Court recently observed in Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered under these circumstances, an important question of freedom of the press under the First Amendment." (note 6).

The petition for certiorari was filed in this case on March 15, 1975. On March 18, this Court again reaffirmed a number of propositions of direct relevance to the case. In Southeastern Promotions, Ltd. v. Conrad, 43 U.S. Law Week 4365, the Court reaffirmed the presumptive unconstitutionality of all prior restraints and observed that:

> "We held in Freedman [v. Maryland, 380 U.S. 51 (1965)], and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Id. at 4370.

Each of these protections has been denied the petitioners in this case. The burden of instituting these proceedings has rested upon the authors and their publisher, not upon their censor; the burden of proof has been held, under the decision of the Court of Appeals, to rest primarily if not exclusively, upon the censored parties and not their censor; the restraint prior to any

judicial review effectively lasted from the submission of the manuscript to the Agency in August 1973 through the decision of the District Court in March 1974; and "prompt final judicial determination" is still, after years of litigation, awaited.

We urge the Court to grant the petition for certiorari.

Respectfully submitted,

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